91-1078

Supreme Court, U.S.
FILED
DEC 26 1991
OFFICE OF THE CLERK

NO. _____

IN THE SUPREME COURT
OF
THE UNITED STATES OF AMERICA

OCTOBER TERM 1991

GEORGE LEWIS BAILES, JR.,
PETITIONER,
VS.
UNITES STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROY M. WEST, COUNSEL OF RECORD
MANLY & MANLY ATTYS.
FRANK NELSON BUILDING
205 20TH STREET NO., STE. 833
BIRMINGHAM, ALABAMA. 35203
(205) 251-8151

RALPH J. BOLEN,
STE. 423 FRANK NELSON BUILDING
205 20TH STREET NO., STE. 423
BIRMINGHAM, ALABAMA 35203
(205) 322-2463

ATTORNEYS FOR PETITIONER

QUESTIONS FOR REVIEW

1. WHETHER A CONGRESSIONAL STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD BE PRESUMED TO HAVE RETROACTIVE EFFECT.

LIST OF ALL PARTIES

Gorge Lewis Bailes, Jr.
Suite 126
#10 Office Park Circle
Birmingham, Alabama 35223

United States of America
Linda S. Trippe
Frank Donaldson
U. S. Attorney's Office
200 Federal Building
Birmingham, Alabama 35203

TABLE OF CONTENTS

QUESTIONS FOR REVIEW i

LIST OF ALL PARTIES ii

TABLE OF CONTENTS 1

TABLE OF AUTHORITIES 1

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS 4

STATEMENT OF JURISDICTION 5

STATUTES INVOLVED IN THE CASE 6

STATEMENT OF THE CASE 10

ARGUMENT 13

CONCLUSION 19

APPENDICES I

APPENDIX A II

APPENDIX D XXI

APPENDIX C XXIV

APPENDIX D XXXI

APPENDIX E XXXVIII

CERTIFICATE OF SERVICE XLII

TABLE OF AUTHORITIES

Bowen v. Georgetown University Hosptital, 488 U.S. 204 (1988).....13

Bradley v. School Board of Richmond, 416 U.S. 696 (1974).....12, 13

Bruner v. U.S., 343 U.S. 112, (1952).....17

C.E.K. Industrial Mechanical Contractors v. N.L.R.B, 921 F2nd 350 (1st Cir. 1990).....15

DeVargas v. Mason, et al., 911 F2d 1377, (10th Cir. 1990).....16

FDIC v. Wright, 942 F2d 1089 (7th Cir. 1991).....14

Kaiser Aluminum v. Bonjorno, 110 S.Ct. 1570 (1990) 13

Lehman v. Burnley, 866 F2d 33 (2nd Cir. 1989).....15

Leland v. Federal Ins. Adm'r., 934 F2d 524, (4th Cir. 1991).....15

Orrego v. 833 West Buena Joint Venture, 943 F2d 730, 734-35 (7th Cir. 1991).....14

Simmons v. Lockhart, 931 F2d 1226, (8th Cir. 1991) 16

U.S. v. Peppertree Apartments, 942 F2d 1555, (11th Cir. 1991).....14

Wagner Seed Company v. Bush, 946 F2d 918 (D.C. Cir. 1991).....15

Walker v. U.S. Dept. of Housing and Urban Development, 912 F2d 819 (5th Cir. 1990).....17

Wright v. Director of FEMA, 913 F2d 1566 (11th Cir. 1990) 17

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

The opinions and orders rendered by the Federal District Court for the Northern District of Alabama, and by the United States Court of Appeals for the Eleventh Circuit, are reproduced and contained within the appendix attached hereto and made a part of this petition.

STATEMENT OF JURISDICTION

1. Date of entry of the judgment or decree sought to be reviewed: September 30, 1991.

2. Date of any order respecting a rehearing and date of any order and the date and terms of any order granting an extension of time within which to file the petition for a writ of certiorari: December 6, 1991.

3. The Judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on September 30, 1991. A suggestion for Rehearing En Banc was timely filed and denied on December 6, 1991, and this petition for certiorari was filed within 90 days from September 30, 1991. This Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THE CASE

Title 12 U.S.C 1715z-4a. Double Damages for unauthorized use of multifamily housing project assets and income

(a) Action to recover assets or income

(1) The Secretary of Housing and Urban Development (referred to in this section as "Secretary") may request the Attorney General to bring an action in a United States district court to recover any assets or income used by any person in violation of (A) a regulatory agreement that applies to a multifamily project whose mortgage is insured or held by the Secretary under Title II of the National Housing Act [section 1707 et seq. of this title]; or (B) any applicable regulation. For purposes of this section, a use of assets or income in violation of the regulatory agreement or any application regulation shall include any use for which the documentation in the books and accounts does not establish that the use was made for a reasonable operating expense or necessary repair of the project and has not been maintained in accordance with the requirements of the Secretary and in reasonable condition for proper audit.

(2) For purposes of a mortgage insured or held by the Secretary under Title II of the National Housing Act [12 U.S.C.A. § 1707 et seq.], the term "any person" shall mean any person or entity which owns a project, as identified in the regulatory agreement, including but not limited to any stockholder holding 25 percent or more interest of a corporation that owns the project; any beneficial owner under any business or trust; any officer, director, or partner of an entity owning the project; and any heir, assignee, successor in interest, or agent of any owner.

(b) Initiation of proceedings and temporary relief

The Attorney General, upon request of the Secretary, shall have the exclusive authority to authorize the initiation of proceedings under this section. Pending final resolution of any action under this section, the court may grant appropriate temporary or preliminary relief, including restraining orders, injunctions, and acceptance of satisfactory performance bonds, to protect the interests of the Secretary and to prevent use of assets or income in violation of the regulatory agreement and applicable regulation and to prevent loss of value of the realty and personalty involved.

(c) Amounts recoverable

In any judgment favorable to the United States entered under this section, the Attorney General may recover double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation, plus all costs relating to the action, including but not limited to reasonable attorney and auditing fees. Notwithstanding any other provision of law, the Secretary may apply the recovery, or any portion of the recovery, to the project or to the applicable insurance fund under the National Housing Act [12 U.S.C.A. § 1701 et seq.]

(d) Time limitation

Notwithstanding any other statute of limitations, the Secretary may request the Attorney General to bring an action under this section at any time up to and including 6 years after the latest date that the Secretary discovers any use of project assets and income in violation of the regulatory agreement or any applicable regulation.

(e) Continued availability of other remedies

The remedy provided by this section is in addition to any other remedies available to the Secretary or the United States.

STATEMENT OF THE CASE

Starting in October, 1979, through February, 1981, the Petitioner secured several loans for the purpose of constructing multifamily housing units, which loans were insured against default by the Secretary of Housing and Urban Development (HUD) pursuant to Section 221(d)(4) of the National Housing Act, 12 U.S.C. 1715l(d)(4).

Each of the aforementioned loans were accompanied by a regulatory agreement with HUD, which provided that income must be used for normal operating expense and necessary repairs, unless, inter alia, the projects had surplus cash as defined in paragraph 16(f) of the agreements. These agreements further provided that in the event of violation by the borrower, HUD may seek relief in any court, either state or federal, for an injunction or other relief for a violation of said agreement.

HUD's Office of Inspector General (OGI) in August, 1986, issued an audit report asserting that certain monies had not been expended within the guidelines as prescribed by the regulatory agreement. On May 14,

1987, HUD issued a notice of proposed disbarment to George L. Bailes, Jr., upon which, hearing was held in November of 1988. After hearing the evidence, the administrative judge entered an order of disbarment.

On May 5, 1989, the United States of America, filed a complaint seeking double damages under 12 U.S.C. 1715z-4a(c), a statute not even in existence at the time of the complained of expenditures. On June 6, 1989, the United States of America filed a motion for summary judgment and memorandum in support thereof. The United States contended that Bailes was collaterally estopped from relitigating the findings of the administrative judge.

Bailes filed an affidavit in response to the motion for summary judgment, expressly disputing the issue that the funds were improperly disbursed. The District Court entered an order and opinion on July 12, 1989, granting summary judgment to the United States, and applied 12 U.S.C.1715z-4a(c) retroactively, awarding double damages with leave to prove attorney fees and costs as provided by the newly enacted statute.

After a variety of post judgment matters, George L. Bailes, Jr., filed a notice of appeal on November 9,

1989. On September 30, 1991, the Eleventh Circuit Court of Appeals affirmed the judgment of the District Court, agreeing that Bradley v. School Board of Richmond, 416 U.S. 696 (1974) mandated retroactive application of the statute. On December 6, 1991, the Suggestion of Rehearing En Banc was denied, and hence, this petition.

ARGUMENT

A STATUTE THAT IS SILENT AS TO CONGRESSIONAL INTENT FOR ITS RETROACTIVE APPLICATION SHOULD NOT BE PRESUMED TO APPLY RETROACTIVELY.

This Court has recognized an apparent tension between the rule of presumed statutory retroactivity announced in Bradley v. School Board of Richmond, 416 U.S. 696 (1974) and the rule of presumed statutory prospectivity announced in Bowen v. Georgetown University Hospital, 488 U.S. 204. In Kaiser Aluminum v. Bonjorno, 110 S.Ct. 1570 (1990), this Court stated:

"We need not in this case, however, reconcile the two lines of precedent represented by Bradley, supra, and Georgetown, supra, because under either view, where the congressional intent is clear, it governs." Id. at 1577.

The instant case presents this Court with the opportunity not available in Kaiser, to wit: resolution of the issue of the presumption of statutory retroactivity in an instance where Congressional intent is silent.

The Court below recognized that the "text and legislative history of section 1715z-4a(c) are silent on this issue [of retrospective or prospective application]". U.S. v. Peppertree Apartments, 942 F2d 1555, 1561, (11th Cir. 1991). In light of this finding, the Court indulged the Bradley presumption that "a court is to apply the law in effect at the time that it renders a decision," Id., and decided that the Circuit was "bound by precedent to apply Bradley," unless otherwise directed by this Court. See Id. at fn. 3.

The Eleventh Circuit stands virtually alone among its companion Circuits by declaring Bradley to govern in situations of undiscernible legislative intent. The Seventh Circuit has recognized that the facts of one case dictate application of the Bradley presumption. See FDIC v. Wright, 942 F2d 1089, 1095, n.6 (7th Cir. 1991). But see Orrego v. 833 West Buena Joint Venture, 943 F2d 730, 734-35 (7th Cir. 1991) (holding that Georgetown prohibits administrative agencies from promulgating retroactive rules).

The First Circuit has seemingly charted a new course on the issue by declaring: "...[T]he touchstone

for deciding the question of retroactivity is whether retroactive application of a newly announced principal would alter substantive rules of conduct and disappoint private expectations." See C.E.K. Industrial Mechanical Contractors v. N.L.R.B, 921 F2d 350, 358 fn.7 (1st Cir. 1990).

But the remainder of the Circuits that have addressed the issue, have in one fashion or another, assumed that this Court's decision in Bowen controls when there is Legislative silence on retroactivity. The Second Circuit has followed the rule in Bowen: "Even where some substantial justification for retroactive application...is presented, courts should be reluctant to find such authority...absent an express statutory grant." (citing Bowen.) See Lehman v. Burnley, 866 F2d 33 (2nd Cir. 1989). The Fourth Circuit has likewise followed the rule in Bowen, See Leland v. Federal Ins. Adm'r., 934 F2nd 524, at 527 (4th Cir. 1991), as has the D.C. Circuit; see Wagner Seed Company v. Bush, 946 F2d 918, at 924 (D.C. Cir. 1991).

Three additional Circuits have squarely confronted the apparent strain between the two lines of cases, and

resolved the confrontation in favor of Bowen. In Simmons v. Lockhart, 931 F2d 1226, (8th Cir. 1991), the Eighth Circuit recognized and decided: "...one must choose between the Bradley and Georgetown Hospital presumptions. The better rule is that of Georgetown Hospital: we will not retroactively apply statutes or regulations without a clear indication that the legislature or administrative agency intends to diverge from the norm of acting prospectively." Id. at 1230. In like fashion, the Tenth Circuit met the two lines of cases head on: "Forced to elect between these contradictory presumptions, we choose Bowen. We find that the Bowen line of cases is well entrenched in the history of Supreme Court jurisprudence, whereas Bradley is largely unsupported by its cited authorities." DeVargas v. Mason, et al., 911 F2d 1377, at 1389 (10th Cir. 1990).

The third of the three Circuits that has squarely addressed the two lines of cases, resolving the conflict in favor of Bowen, recognizes a limited role that Bradley should play: "...Bradley expresses no presumption of statutory retroactivity; rather, it binds courts, with some exceptions, to apply legislation enacted while

cases are pending decision, not those already decided, or those, as here, that may evade decision completely." Walker v. U.S. Dept. of Housing and Urban Development, 912 F2d 819, at 831 (5th Cir. 1990).

Finally, the Ninth Circuit managed to elicit the rule of prospectivity without the assistance of Bowen, but by relying on past precedent of this Court antedating both Bowen and Bradley, "As a general rule, legislative enactments, including constitutional amendments, apply only prospectively." (citing Bruner v. U.S., 343 U.S. 112, 117 (1952)).

The Eleventh Circuit is still wed to the concept of Bradley, even though there is authority within the Eleventh Circuit itself to the contrary. In Wright v. Director of FEMA, 913 F2d 1566 (11th Cir. 1990), the Eleventh Circuit recognized: "The principal affirmed in Bradley has generated some confusion in the Federal Courts, since it appears to conflict with the aforementioned long standing rule of statutory construction restated in Bowen, that favors the prospective application of statutes and regulations." (citations omitted.)

As shown from the above survey of Circuits, perhaps the most confusion visited upon the Federal

Courts because of the opposing principles has been within the Eleventh Circuit itself. Despite authority from this Court, and from authority from other Federal Circuits, the Eleventh Circuit will not divorce itself from the rule of Bradley, unless this Court so decrees.

The question at Bar has been addressed by several Circuits. The Second, Fourth, Fifth, Eighth, Ninth, Tenth, and D.C. Circuits have followed the long accepted rule of prospective application. However, the Eleventh Circuit seems to be the only true "Bradley Circuit" left in the Federal system, though to a lesser extent the Seventh Circuit also has followed Bradley. The First Circuit appears to have its own rule. This Court has the opportunity to either set the Eleventh Circuit, Seventh Circuit and First Circuit on the proper path, or to correct the seven other Circuits that have strayed.

Lastly, the problems that Peppertree has generated becomes obvious in the context of the retroactive application of the 1991 Civil Rights Act. At least one Judge of the Federal District Court for the Northern District of Alabama has noted:

"Fresh from it's victory in Peppertree, the same United States which there fought for and obtained retroactive

application of a statute doubling the damages to be paid by a violator, filed a brief in Van Meter v. Barr, Civil Action No. 91-0027 (GAG), in the United States District Court for the District of Columbia, stating at considerable length the Department of Justice's position, entirely inconsistent with the exemplary victory it won in Peppertree, that no provision of the Civil Rights Act of 1991 applies to any case pending prior to November 21, 1991." See King v. Shelby Medical Center, 91-AR-2258-S, memorandum opinion entered Dec. 18, 1991, Northern District of Alabama, Southern Division.

CONCLUSION

The writ of certiorari should issue to correct and clarify the expressly unresolved issue raised by this Court in Kaiser, concerning the presumption of statutory retroactivity or prospectivity. This Court's decision can then clarify to all of the Circuits the proper presumption, and afford uniformity where conflict now exists.

Respectfully Submitted,

ROY M. WEST, COUNSEL OF RECORD
MANLY & MANLY ATTYS.
FRANK NELSON BUIDING
205 20TH ST. N., STE. # 833
BIRMINGHAM, ALABAMA 35203

RALPH J. BOLEN
FRANK NELSON BUILDING
205 20TH ST. N., STE. # 423
BIRMINGHAM, ALA. 35203

APPENDICES

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

PEPPERTREE APARTMENTS,
City Court II Apartments,
et al., Defendants,

George Bailes Jr., Defendant-Appellant.

No. 89-7850.

United States Court of Appeals,
Eleventh Circuit.

September 30, 1991.

Appeal from the United States District Court for the Northern District of Alabama.

Before BIRCH, Circuit Judge, DYER, Senior Circuit Judge and MOYE[1] , Senior District Judge.

BIRCH, Circuit Judge:

Appellants George Bailes, Jr. ("Bailes"), Bailes Realty Company, Peppertree Apartments, City Court

---

1* Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

II, Rainbow Apartments Company, and College Manor Ltd. appeal from an order of the United States District Court for the Northern District of Alabama. We agree with the district court's decisions to apply collateral estoppel to the findings of the administrative law judge, grant the motion of the United States for summary judgment, and award the United States damages in the amount provided by 12 U.S.C. section 1715z-4a(c). Accordingly, we AFFIRM the district court's order.

I. BACKGROUND

A. Factual Background

Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects located in Alabama. Each of the projects was built with the proceeds of a loan which was insured against default by the Secretary of Housing and Urban Development ("HUD") under authority granted by 12 U.S.C. section 1715l(b). HUD provides such mortgage insurance "to assist private industry in providing housing for low and moderate income families and displaced families." 12 U.S.C. section 1715l(a).

Each of these four housing projects is owned by a separate partnership entity. However, Bailes is a managing or general partner in each of the entities. At all times relevant to this action, Bailes Realty Company, of which Bailes is the sole owner, was the managing agent for the bank accounts of each of the projects.

In consideration for the mortgage insurance provided by HUD, each of the housing projects entered into an identical regulatory agreement with HUD. Each of the agreements was signed by Bailes, on behalf of the project owners, as managing partner, or general partner. The agreements prohibit project owners from using project income or other assets for any purpose other than "reasonable operating expenses and necessary repairs" without the prior written approval of HUD. R1-4-Ex.A 8(b). The agreements further provide that the expenditure of project funds that the expenditure of project funds is prohibited unless the project has "surplus cash" and certain other conditions are met. R1-4-Ex.A 8(e). In the event the project owners violate any provision of these agreements, the agreements provide that HUD may

[a]pply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violation of this Agreement, for the appointment of an receiver to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to [HUD] arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

R1-4-Ex.A 14(d).

B. Procedural Background

Claiming that Bailes had made expenditures in violation of the regulatory agreements, HUD determined that Bailes should be debarred from participation in HUD programs for a period of five years. After receiving notice of his proposed debarment, Bailes requested a hearing before HUD's Board of Contract Appeals. An Administrative judge of HUD's Board of Contract Appeals conducted a quasi-judicial proceeding, including an evidentiary hearing, after which she ruled from the bench. The administrative

judge found that Bailes had made a net distribution of $90,311 in project funds to money market accounts in his name and that he had not replaced that money despite knowing that those distributions violated the regulatory agreements. The administrative judge further found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these money market accounts. Accordingly, Bailes and his affiliate, Bailes Realty Company, were debarred from participation in HUD programs for five years.

The United States filed suit in the district court, seeking to recover from Bailes and the other project owners the $90,311 that had not been returned to the projects' accounts as well as statutory damages. The United States the filed a motion for summary judgment, contending that collateral estoppel barred the relitigation of issues raised in the administrative proceeding. The district court granted the government's motion for summary judgment, and awarded the government double damages and costs as authorized by 12 U.S.C. section 1715z-4a(c).

Bailes filed a motion in the district court, requesting that court reconsider the award of double damages.

Bailes noted that 12 U.S.C. section 1715z-4a(c), the authority pursuant to which the district court awarded double damages, was passed in 1987, while the violations of the regulatory agreements took place in 1985 and earlier. Bailes contended that this statutory provision for double damages was not to be applied retroactively. The district court disagreed, and denied Bailes's motion.

Bailes now challenges the district court's use of collateral estoppel, grant of summary judgment in favor of the United States and award of double damages.

II. DISCUSSION

A. Collateral Estoppel

[1,2] "'The doctrine of collateral estoppel precludes a party from relitigating an issue that was fully litigated in a previous action.'" Palciauskas v. United States, 939 F.2d 963 (11th Cir.1991) (quoting Deweese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir.1982)). Collateral estoppel may prevent the relitigation in a judicial action of issues of fact previously decided in an administrative proceeding. Pantex Towing Corp. v. Glidewell, 763 F.2d 1241, 1245 (11th Cir.1985).

[W]hen an administrative body has acted in a judicial capacity and has issued a valid and final decision on disputed issues of fact properly before it, collateral estoppel will apply to preclude relitigation of fact issues only if: (1) there is identity of the parties or their privies; (2) there is identity of issues; (3) the parties had an adequate opportunity to litigate the issues in the administrative proceeding; (4) the issues to be estopped were actually litigated and determined in the administrative proceeding; and (5) the findings on the issues to be estopped were necessary to the administrative decision.

Id. The district court properly applied the doctrine of collateral estoppel to preclude the relitigation of the issues of fact determined by the administrative judge of HUD's Board of Contract Appeals.

1. Identity of the Parties

The first part of the Pantex Towing test clearly has been met. The parties involved in the administrative proceeding before HUD's Board of Contract Appeals were Bailes, Bailes Realty Company and the government. The parties to this action are Bailes,

Bailes Realty Company, the four housing projects, and the government. Bailes is a general partner of each of the partnership owners of the housing projects. Accordingly, the parties involved in this action are either the parties involved in the administrative action or the privies of Bailes, a party to the original action. Furthermore, the district court's order granting the government's motion for summary judgment and double damages provides that "the United States shall have and recover from George L. Bailes, Jr., the sum of ... $180,622 and costs." R1-9 (emphasis added). Thus, parties affected by the administrative proceeding and the events in the district court are the same.

2. Identity of the Issues

The issue addressed by both the administrative judge and the district court was whether Bailes distributed project funds in violation of the regulatory agreements. The complaint filed by HUD with the Board of Contract Appeals charged Bailes with making disbursements from project funds in violation of the regulatory agreements. R1-4-Ex.E-2 at 5. The administrative judge recognized that this was an issue at the

administrative hearing. R1-4-Ex.E-4 at 538 ("HUD charged as grounds for debarment, that George Bailes violated the Regulatory Agreement ... [by] making unallowable distribution[s] of project funds ..."). The claim filed by the United States in the district court alleged that the regulatory agreements had been violated by the prohibited disbursement of project funds. Thus, the factual issue to be addressed by the district court was the same issue previously before the administrative judge.

3. Adequate Opportunity

Bailes had an adequate opportunity to litigate the relevant issue in the administrative hearing, i.e., whether he disbursed project funds in violation of the regulatory agreements. The proceedings before the administrative judge were quasi-judicial in nature and included an evidentiary hearing. Furthermore, Bailes stipulated that numerous disbursements of project funds were made to money market accounts. Thus, Bailes had an adequate opportunity to litigate the issue of whether he distributed project funds in violation of the regulatory agreements.

4. Actually Litigated

The issue of whether Bailes disbursed project funds in violation of the regulatory agreements actually was litigated and determined in the administrative hearing. The administrative judge stated that "[t]he most serious charge [against Bailes] involves the movement of project operating funds into money market accounts where they were commingled with non-project monies in violation of the Regulatory Agreement." R1-4-Ex.E-4 at 550-51. The administrative judge then determined that more than $90,000 of that money had not been placed and that "interest earned by those project funds has not been accounted for or replaced." Id. at 551. She further described Bailes's transfer of project funds into money market accounts as "wholesale violations of ... the Regulatory Agreement." Id. Accordingly, the issue of whether Bailes violated the regulatory agreements clearly was litigated and determined in the administrative proceeding.

5. Necessary to the Administrative Decision

The administrative judge's determination that Bailes had disbursed project funds in violation of the

regulatory agreement was necessary to the administrative decision to debar Bailes from further participation in HUD programs for five years. The administrative judge found the charge against Bailes of wrongful disbursement of project funds to be the most serious charge against him. Id. at 552. Furthermore, the administrative judge stated that her decision to debar Bailes from further participation in HUD programs for five years was based on the financial violation of the regulatory agreements. Id. at 553, 554. Thus, the administrative judge's finding that Bailes had made unauthorized use of project funds was essential to her administrative decision.

The district court properly applied the five-part Pantex Towing test. Accordingly, the district court correctly determined that the doctrine of collateral estoppel precluded the relitigation of the factual issues before HUD's Board of Contract Appeals.

B. Summary Judgment

[3,4] When reviewing a district court's grant of a motion for summary judgment, we employ the standard applied by the district court when that court con-

sidered the motion. Martin v. Commercial Union Ins. Co., 935 F.2d 235, 238 (11th Cir.1991). Thus, we examine the evidence in the light most favorable to the non-moving party, and determine whether there exist any genuine issues of material fact which would preclude the grant of summary judgment. Id. As discussed above, the doctrine of collateral estoppel precluded the relitigation of factual issues determined by HUD's Board of Contract Appeals. The district court recognized that the administrative judge considered and resolved the material fact issues in this case:

> The Administrative Judge found that Bailes had made a net distribution of $90,311.00 to his money market accounts and that he had not replaced that money despite knowing that these distributions violated the regulatory agreements. The Administrative Judge also found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these accounts.

R1-8-2 (footnotes and citation omitted.) Thus, the district court properly granted the government's motion for summary judgment.

C. Retroactive Application of 12 U.S.C. section 1715z-4a(c)

[5] Pursuant to 12 U.S.C. section 1715z-4a(c),[2] the district court awarded the united States damages in the amount of $180,622 -- double the amount of project funds disbursed in violation of the regulatory agreements. Because Bailes's violations of the regulatory agreements occurred before section 1715z-4a(c) was enacted, Bailes contends that the district court should not have awarded the government double damages. We disagree.[3]

---

2. Section 1715z-4a(c) provides:

> In any judgment favorable to the United States entered under this section [entitled "Double damages remedy for unauthorized use of multifamily housing project assets and income"], the Attorney General may recover double the value of the assets and income of the project that the court determines to have been used in violation of the regulatory agreement or any applicable regulation, plus costs relating to the action, including but not limited to reasonable attorney and auditing fees. Notwithstanding any other provision of law, the Secretary may apply the recovery, or any portion of the recovery, to the project or to the applicable insurance fund under the National Housing Act.

3. Bailes also claims that section 1715z-4a(c) does not apply to him because he is not a "person" within the meaning of that section. This claim is without merit. Section 1715z-4a(a)(2) defines "person" as any person or entity which owns a project, as identified by the regulatory agreement, including but not limited to any stockholder holding 25 percent or more interest of a corporation that owns the project;

[6,7] First, the change in section 1715z-4a(c) was remedial in nature. The statutory change provided that the government's remedy for the unauthorized use of housing project funds was the recovery of double damages, i.e., damages equal to double the value of the assets distributed in violation of the regulatory agreement. Statutory changes that are remedial in nature apply retroactively. Lussier v. Dugger, 904 F.2d 661, 665 (11th Cir.1990)(quoting United States v. Vanella, 619 F.2d 384, 386 (5th Cir.1980)); see also United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir.1985)("[C]ases in this circuit have held that new statutes ... that affect only ... remedy will apply retroactively.").

[8] Second, "a court is to apply the law in effect at the time it renders its decision, unless doing so

---

any beneficial owner under any business or trust; any officer, director, or partner of an entity owning the project; and any heir, assignee, successor in interest, or agent of any owner. Bailes was a partner of each of the partnerships owning the projects and the owner of Bailes Realty Company, the manager of each of the projects. He clearly is a "person" within the meaning of section 1715z-4a(a)(2).

would result in manifest injustice or there is statutory direction or legislative history to the contrary." Bradley v. School Board of Richmond, 416 U.S. 696, 711, 94 S.Ct. 2006, 2016, 40 L.Ed.2d 476 (1974).[4] To determine whether retroactive application of section 1715z-4a(c) would result in manifest injustice, Bradley requires that we review three factors: "(a) the nature

---

4. We recognize that there exists some confusion as to the applicability of this Bradley analysis. See Wright v. Director, Federal Emergency Management Agency, 913 F.2d 1566, 1573 (11th Cir.1990)("[T]he principle affirmed in Bradley has generated some confusion in the federal courts, since it appears to conflict with the...long-standing rule of statutory construction, restated in Bowen [v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 109 S.Ct. 468, 471, 102 L.Ed.2d 493 (1988)], that favors the prospective application of statutes and regulations."). The Supreme Court has declined to clarify this confusion. See Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, —, 110 S.Ct. 1570, 1577, 108 L.Ed.2d 842 (1990)("We need not in this case ... reconcile the two lines of precedent represented by Bradley ... and [Bowen]..."). This circuit has relied upon the Bradley analysis to determine the retroactive application of statutory changes. See Federal Deposit Ins. Corp. v. 232, Inc., 920 F.2d 815, 818 n. 4(11th Cir.1991)(The court provided several examples of this circuit's utilization of the Bradley analysis.). Thus, unless otherwise directed by the United States Supreme court or the Eleventh Circuit en banc, we are bound by precedent to apply the Bradley analysis. See United States v. Thomas, 916 F.2d 647, 652 n. 6 (11th Cir.1990).

requires that we review three factors: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717, 94 S.Ct. at 2019. Our review of these factors leads us to the conclusion that manifest injustice would not result from the retroactive application of section 1715z-4a(c).

"The first consideration, the nature of the parties, arises from the distinction ... between private disputes and 'great national concerns.'" United States v. Marengo County Comm'n, 731 F.2d 1546, 1554 (11th Cir.1984). This case is not merely the result of a dispute between two private individuals. Rather, it involves HUD, an administrative agency of the federal government, and an issue of national concern, the utilization of private industry for the provision of housing for low and moderate income families and displaced families. Thus, consideration of the first Bradley factor supports the retroactive application of the double damages penalty of section 1715z-4a(c).

We next consider the nature of the parties' rights. "The Court has refused to apply an intervening change

to a pending action where it has concluded that to do so would infringe upon or deprive a person of a right that had matured or become unconditional." Bradley, 416 U.S. at 720, 94 S.Ct. at 2020. Section 1715z-4a(c) does not affect any substantive right of Bailes. The change in the statute was remedial. As discussed above, the remedial nature of the statutory change supports the retroactive application of section 1715z-4a(c). Furthermore, the regulatory agreements provide that HUD may seek any "relief as may be appropriate." R1-4-Ex.A par. 14(d).

The third Bradley factor requires us to consider whether "a new and unanticipated obligation [][would be] imposed upon a party without notice or an opportunity to be heard." Bradley, 416 U.S. at 720, 94 S.Ct. at 2021. Section 1715z-4a(c) does not impose a new obligation upon Bailes. Instead, it imposes an additional remedy on already proscribed conduct. As stated by the district court, "[t]he statute imposed no new obligation; it merely reinforced an existing one." R1-14 at 3. Thus, after consideration of the factors set forth in Bradley, we determine that the application of

section 1715z-4a(c) to this case does not result in "manifest injustice."

Under Bradley, we also must determine from the statute itself and its legislative history whether Congress intended the statute to apply prospectively only. The text and legislative history of section 1715z-4a(c) are silent on this issue. Accordingly, we hold that the district court correctly held Bailes responsible for double damages as provided by section 1715z-4a(c).

AFFIRMED.

APPENDIX B

THE UNITED STATE COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 89-7850

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PEPPERTREE APARTMENTS,
CITY COURT II APARTMENTS, et al.,
Defendants,

GEORGE BAILES, JR.,
Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, 942 F.2d 1555).

Before: BIRCH, Circuit Judge, DYER, Senior Circuit Judge and MOYE*, Senior District Judge.

PER CURIAM:

[X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rule of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

[ ] The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

[ ] A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

*Honorable Charles A. Moye, Jr., Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

Entered December 6, 1991.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.

ORDER

Pursuant to the Opinion filed herewith, the court ORDERS as follows:

Defendants' motion to dismiss is DENIED.

Plaintiff's motion for summary judgment is GRANTED. The court FURTHER ORDERS that the United States shall have and recover from George L. Bailes, Jr., the sum of One Hundred Eighty Thousand Six Hundred Twenty-Two Dollars ($180,622.00) and costs. Any costs other than taxable costs shall be

determined under Northern District Rule 11 and not delay the finality of this judgment.

This the 12th day of July, 1989.

/S/ Sam Pointer
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

PEPPERTREE APARTMENTS; CITY COURT II; RAINBOW APARTMENTS COMPANY; COLLEGE MANOR LTD.; BAILES REALTY COMPANY; GEORGE L. BAILES, JR.,

Defendants.

OPINION

The United States of America ("United States") brings this action pursuant to Section 221 of the National Housing Act, 12 U.S.C. section 1715(1), alleging defendants have taken and retained $90,311 from four housing projects in violation of this contractual obligations. Peppertree Apartments, City Court II Apartments, Rainbow Apartments, and College Manor Apartments are multifamily housing projects, each built with proceeds of a loan which is insured against default by the Secretary of Housing and Urban Development ("HUD"). Each of the projects is owned by a separate partnership entity.

George L. Bailes is a managing or general partner in each of these entities and is the sole owner of Bailes Realty Company which, at all times relevant to this action, was the managing agent for each of the projects' bank accounts. Each of the owners entered into an identical Regulatory Agréement contract with HUD. Among the provisions in this agreement was a provision which prohibited owners from using project rents and income for any purpose other that "reasonable operating expenses and necessary repairs." Para.8(b).[1] Among the remedies available should the owner violate the regulatory agreement is a provision that the government "may recover double the value of the assets and income of the project that [a] court determines to have been used in violation of the regulatory agreement. 12 U.S.C. 1715z-4a(c)." The government may also recover the reasonable costs it incurs in bringing the action, including reasonable attorney and auditing fees. Id.

---

1. Paragraph 8(e) provides that funds can be used for other purposes when the project has "surpluss cash" or when the owner has HUD's prior written approval for an otherwise unauthorized expenditure.

Defendants move to have this complaint dismissed, asserting that the sum made the basis of this suit were used for "the necessary and reasonable expenses incurred for operating the projects." (Bailes Affidavit). Plaintiff United States moves for summary judgment against the defendant. Plaintiff's motion is based on findings of an Administrative Judge of HUD's Board of Contract Appeals made after a quasi-judicial proceeding, including an evidentiary hearing, in which the issues now raised by the plaintiff in this case were fully adjudicated. (In the Matter of George L. Bailes, Jr., HUDBCA No. 88-3412-D27; Docket No. 88-1214-DB.) (Debarment Hearing held on November 1-4, 1988). The Administrative Judge found that Bailes had made a net distribution of $90,311.00 to his money market accounts[1] and that he had not replaced that money despite knowing that these distributions violated the regulatory agree-

1. The diversions totalled $1,519,711.00. Following an audit by HUD's Office of Inspector General, Bailes returned $1,414,800.00; following the administrative proceeding, Bailes returned an additional $14,600.00.

ments.[1] (Plaintiff's Exhibit E-4 at 541-543, 550-552). The Administrative Judge also found that as of the date of the hearing Bailes had not accounted for or repaid interest earned on these accounts. The United States now seeks to recover the amount that has not been returned to the projects, $90,311.00, and statutory damages.

Under the doctrine of collateral estoppel, the defendants may not relitigate the issues raised in the administrative proceeding and may not dispute the findings made by the Administrative Judge after the proceeding. Pantex Towing Corp. v. Glidewell, 763 F.2d 1241 (11th Cir. 1985). The court is of the opinion that these findings fully support the relief requested. Accordingly plaintiff's motion for summary judgment is due to be GRANTED. Defendants' motion to dismiss is due to be DENIED.

This the 12th day of July, 1989.

/S/ Sam Pointer

1. HUD's complaint alleged that Bailes had distributed $1,519,711.00 in project funds in violation of the Regulatory Agreements.

United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.)

ORDER

For the reasons expressed in the accompanying opinion, the motion to reconsider of defendant George L. Bailes, Jr., is hereby DENIED, and the motion of plaintiff United States of America to dismiss the counterclaim is DENIED.

This the 10th day of October, 1989.

/S/ Sam Pointer
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
Southern Division
Case No. 89-P-0794-S

THE UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
PEPPERTREE APARTMENTS; CITY)
COURT II; RAINBOW APARTMENTS)
COMPANY; COLLEGE MANOR LTD.;)
BAILES REALTY COMPANY; GEORGE)
L. BAILES, JR.,)
)
Defendants.)

OPINION

This case grows out of agreements between defendants and the Secretary of Housing and Urban Development (HUD), involving the construction by defendants of multifamily housing projects with loans insured by HUD. In return for the loan insurance, HUD restricted the rents which defendants could charge and the uses to which the defendants could put income from the projects. In this action, the United States charged that the defendants, in violation of the agreements, retained $90,311.00 from project rents and income. On July 12, 1989, this court granted summary judgment in favor of the

United States, and entered a judgment against defendant George L. Bailes, Jr., of $180,622.00, double the amount retained.

The case is now before the court on a motion by defendant Bailes to reconsider the award of double damages, as well as a motion by plaintiff United States of America to dismiss Bailes' counterclaim on jurisdictional grounds. This court concludes that the award of double damages was appropriate, and that the counterclaim is not to be dismissed.

2. Defendant's Motion to Reconsider

This court awarded double damages pursuant to 12 U.S.C. section 1715z-4a(c), which explicitly provides for such awards. Defendant points out that this section was passed in 1987, and that the defendants' violations of the agreements took place in 1985 and earlier. Defendant contends that the statutory provision for double damages ought not be applied retroactively. This court, however, disagrees.

The leading case in this area is Bradley v. Richmond School Board, 416 U.S. 696 (1974), in which

the Supreme Court discussed the retroactive effect of a statute authorizing awards of attorney's fees in certain cases. Bradley invoked "the principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Id. at 711. While Bradley's holding focussed on appellate courts' application of newly passed statutes to pending cases, Bradley's analysis is equally applicable here.

There is no indication that Congress intended that 12 U.S.C. section 1715z-4a(c) should apply only prospectively. Nor do the statute's purposes imply such an intent. Accordingly, the statute is to be applied retroactively in this case, absent "manifest injustice." Of the three factors identified in Bradley as relevant to "manifest injustice"; all lead to the conclusion that retroactive application is appropriate here. First, this is not "a routine private lawsuit," 416 U.S. at 718. Like Bradley, this case involves a "great national concern." Id. at 719. Second, the statute in question does not affect a "matured or un-

conditional right" of the defendant, id. at 720. Third, the statute cannot be said to have imposed "new and unanticipated obligations" on the defendant "without notice or an opportunity to be heard." Id. The statute imposed on new obligation; it merely reinforced an existing one. If the defendant was relying on a scheme which threatened only single damages, that reliance was unjustified.

In short, the statute in question is to be applied retroactively, as are most statutes "that affect only procedure or remedy." United States v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985). Accordingly, defendant's motion to reconsider is to be denied.

3. Plaintiff's Motion to Dismiss Counterclaim

The counterclaim charges that the United States wrongly denied the defendants rent increases and surplus cash from the housing projects. Each count is styled as a breach of contract claim. Defendants seek injunctive and declaratory relief, and monetary relief of more than two million dollars. The United States moves to dismiss the counterclaim, arguing that this court has no jurisdiction.

The United States directs this court's attention to 28 U.S.C. section 1346(a)(2), sometimes known as the Tucker Act. That section grants jurisdiction to the Claims Court over breach of contract claims against the United States. It also grants jurisdiction to the district court over contract claims not exceeding $10,000.00. This court knows of no statute which confers jurisdiction on the district courts for contract claims exceeding $10,000.00. Accordingly, the Claims Court's jurisdiction over such claims is exclusive, notwithstanding defendants' arguments that judicial economy supports a contrary rule.

Yet this court cannot, at this early stage, conclude that the counterclaim falls within that exclusive jurisdiction of the Claims Court. First, defendants seek, inter alia, non-monetary equitable relief. The Claims Court may not have the power to grant that relief. Bowen v. Massachusetts, 108 S.Ct 2722, 2737 (1988). Second, if the counterclaim is in substance, a request for judicial review of adverse action by an administrative agency, this court may have jurisdiction pursuant to 5 U.S.C. section 702 and 28 U.S.C. section 1331.

This court's jurisdiction under 5 U.S.C. section 702 and 28 U.S.C. section 1331 may extend even to the granting of the monetary relief which defendants seek. Bowen v. Massachusetts, supra, and Esch v. Yeutter, 876 F.2d 976 (D.C.Cir. 1989) hold that district courts can in certain cases order the United States to pay sums greater that $10,000, the Tucker Act notwithstanding. Though Bowen v. Massachusetts and Esch involved jurisdiction over complaints, their reasoning is equally applicable to counterclaims.

This court cannot yet determine whether it has jurisdiction over all or part of the counterclaim. Given that uncertainty, it is proper to retain jurisdiction until the substance of the claim can be determined. Accordingly, the motion by the United States to dismiss the counterclaim is to be denied, with the understanding that this court may at some time revisit the issue.

This the 10th day of October, 1989.

/S/ Sam Pointer
United States District Judge

APPENDIX E

UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT
BOARD OF CONTRACT APPEALS
WASHINGTON, D. C.

GEORGE LEWIS BAILES, JR.,)
Respondent)HUDBAC NO.
)88-3412-D27
)
)DOCKET NO.
)88-1214-DB

(Transcipt excerpt, taken on November 4, 1988)

DECISION

The purpose of debarment is to assure the Government that it only does business with responsible contractors and grantees. Responsibility is a term of art in government contract law, and it means the integrity and honesty of a contractor, as much as his ability to perform a contract properly.

The test for the need for debarment is present responsibility. However, a finding of present lack of responsibility may be on past acts.

George Bailes, Jr. has been charged with serious repetitive and pervasive deficiencies in his

role as general partner and management agent for the four HUN projects. The most serious charge involves the movement of project operating funds into money market accounts where the were commingled with non-project monies in violation of the Regulatory Agreement. And over $90,000 has still not been replaced.

Mr. Bailes knew the money was not surplus cash. He is law trained and certainly understands the provisions of the various contracts he signed. I hold him to those contract provisions.

As he acknowledged in testimony, two wrongs don't make a right. Ant dispute over rental increases have no bearing and in no way justify or mitigate the wholesale violations of Paragraph 8 of the Regulatory Agreement.

Funds of the project were not handled by Mr. Bailey as a trustee should have handled funds, even if they were to his mind held in trust. They were, in fact, converted to the use of the partnerships to pay partnership debts. I find this outrageous, inexcusable and shocking in its disregard for the financial sanctity

of the projects as opposed to the financial sanctity of the partnerships and its partners.

It is conduct totally lacking in responsibility. It went on after it's after its allowability was brought to Mr. Bailey attention by his own CPA. Despite promises to repay, I find little actual performance of such promises to repay.

Paying $14,000 on a $115,000 bill, without taking interest due into consideration, is so insufficient to call the entire promise to repay into question.

Likewise, payment of notes and construction expenses are not allowed out of project operating funds. The agreements are clear on that fact. Any construction of development expenses not covered by escrow must be paid out of personal fund or surplus cash only. This was a clear violation of Paragraph 8 of the Regulatory Agreement, and I find that the disregard of that requirement showed a lack of responsibility, if it was due to negligence or a deliberate violation.

The other charges are less serious than this, but taken in their entirety form a pattern of stubborn-

ness, refusal to give heed to well-substantiated, documents and warranted requests and demands by HUN for replacement of project management. I do see improvements in these areas, but only after imposition of a Temporary Denial of Participation and a freezing of rent increases to obtain contract compliance.

Some of the deficiencies were not easy to solve, particularly at City Court II, and some were solved and corrected in due course, but the overall picture is of a contractor lacking responsibility in the overall refusal to comply.

The present attitude of Mr. Bailey, as he stated to me right here in this courtroom, on the most serious charges to me, standing alone, without considering any of the other charges, merits and, indeed, demands a five year sanction.

Taking into consideration the time for which calculation of those five years is to begin, I find the debarment of George L. Bailey, Jr. and his affiliate, Bailey Reality Company, is warranted and necessary, up to and including August 15, 1992. The financial

violations alone cause me to take this action. This is the end of my decision.

CERTIFICATE OF SERVICE

I Roy Manly West do hereby further certify that I have complied with the Supreme Court Rule 29.4. (a) by mailing a copy of this petition to Solicitor General, Department of Justice, Washington D.C. 20530 and I have served three copies of the attached petition upon the United States of America by placing three copies of same in the United States Mail properly addressed and first class postage prepaid to Linda S. Trippe Assistant U. S. Attorney 1800 5th Avenue North Suite 200, Birmingham, Alabama 35203 telephone number (205) 731-1785 on this the 26th day of December, 1991.

Roy M. West, and Ralph J. Bolen
Attorneys for Petitioner
423 Frank Nelson Building
Birmingham, Alabama 35203
Telephone: (205) 322-2463